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Supreme Court U.S.
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In the
Supreme Court of the United States

EXECUTIVE TOWERS AT LIDO, LLC,
PAULSEN REAL ESTATE CORP., 465 SHORE ROAD, LLC,
10 MONROE BOULEVARD, LLC, 25 FRANKLIN BOULEVARD, LLC,
Petitioners,

v.

THE CITY OF LONG BEACH and
THE CITY COUNCIL OF THE CITY OF LONG BEACH,
Respondents.

On Petition For a Writ Of Certiorari to the Appellate Division, Second Department of the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant municipality engages in "egregious or arbitrary" conduct entitling plaintiff landlords to monetary damages under 42 U.S.C. §1983 premised upon the violation of plaintiffs' civil rights, where the municipality, despite the judicially-confirmed absence of a housing emergency which had ended the municipality's limited statutory authority to impose rent regulation, in response to political pressure, willfully and repeatedly refuses to end the enforcement of rent regulation of plaintiffs' buildings over the course of decades?

2. Whether a defendant municipality engages in "egregious or arbitrary" conduct entitling plaintiffs to monetary damages under 42 U.S.C. §1983, where, in addition to the conduct described above, the municipality enacts a new Ordinance which arbitrarily combines two classifications of rental buildings which had been historically separate to create a classification which purportedly met the prerequisites for a declaration of a housing emergency as to that new classification, where the Courts below expressly found that the municipality had conducted no bona fide investigation, no "good faith study" and considered no "precise data" as to the vacancy rate which were judicial prerequisites to such declaration before it enacted the Ordinance?

3. Whether a defendant municipality's decades-long conduct in continuing the enforcement of rent regulation on plaintiffs' buildings in the proven absence of a housing emergency, and after its statutory authority to do so had ended, constitutes an uncompensated taking of private property

entitling plaintiffs to damages for violation of their constitutional rights?

PARTIES TO THE PROCEEDING

The parties to this proceeding are as set forth in the caption. There have been no changes in the parties.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Plaintiffs have no parent companies, subsidiaries, affiliates or interests other than those held by family members.

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The Judgment of the Supreme Court of the State of New York, Nassau County entered April 10, 2007 is unpublished but appears in the Appendix at pages 10a-13a. The Decision and Order of the Appellate Division, Second Department entered February 20, 2007 which led directly to the Judgment is published at 37 A.D.3d 650, 2007 N.Y. App. Div. LEXIS 2107 (2d Dept. 2007), and appears in the Appendix at pages 4a-9a. The Appellate Division affirmed the Order of Supreme Court, Nassau County entered October 5, 2005. The October 5, 2005 Order is unpublished but appears in the Appendix at pages 14a-38a.

The Decision of the Appellate Division, Second Department entered July 13, 2007 which denied plaintiffs' motion seeking leave to appeal to the New York Court of Appeals from the Judgment entered April 10, 2007, thereby bringing up for review the Appellate Division's Order entered February 20, 2007, is unpublished but appears in the Appendix at pages 2a-3a. The Decision of the New York Court of Appeals entered November 15, 2007 which denied plaintiffs' motion for leave to appeal to that Court is published at 9 N.Y.3d 813 (2007), and appears in the Appendix at 1a.

JURISDICTION

This petition seeks review of the Order of the Appellate Division Second Department of the State of New York entered February 20, 2007 which led directly to the final judgment of the Supreme Court of the State of New York, Nassau County entered April 10, 2007, which, among other things, dismissed

plaintiffs' claim for damages under 42 U.S.C. section 1983. The New York Court of Appeals denied plaintiffs' motion for leave to appeal by Order dated November 15, 2007 (*Executive Towers at Lido, LLC v. City of Long Beach*, 9 N.Y.3d 813 [2007]). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1, which provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 42 U.S.C. §1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within

the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. Section 8623 of New York's Emergency Tenant Protection Act (McKinney's Unconsol. Laws § 8623), which provides, in pertinent part:

a. The existence of public emergency requiring the regulation of residential rents for all or any class or classes of housing accommodations...shall be a matter for local determination within each city, town or village. Any such determination shall be made by the local legislative body of such city, town or village on the basis of the supply of housing accommodations within such city, town or village, the condition of such accommodations and the need for regulating and controlling residential rents within such city, town or village. A declaration of emergency may be made as to any class of housing accommodations if the vacancy rate for the housing accommodations in such class within such municipality is not in excess of five percent and a declaration of emergency may be made as to all housing accommodations if the vacancy rate of the housing accommodations within such municipality is not in excess of five percent.

b. The local governing body of a city, town or village having declared an emergency pursuant to subdivision a of this section may at any time, on the basis of the supply of housing

accommodations within such city, town or village, the condition of such accommodations and the need for continued regulation and control of residential rents within such municipality, declare that the emergency is either wholly or partially abated or that the regulation of rents pursuant to this act does not serve to abate such emergency and thereby remove one or more classes of accommodations from regulation under this act. The emergency must be declared at an end once the vacancy rate described in subdivision a of this section exceeds five percent.

INTRODUCTION

This Court has recognized that a section 1983 claim is maintainable premised upon violations of plaintiffs' constitutional rights, when a governmental entity acts "outside the bounds of its authority" in taking private property for public use, or when a governmental entity, acting pursuant to proper authorization, takes private property for public use without providing just compensation (see e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 722, 119 S.Ct. 1624, 143 L.Ed.2d 882 [1999]).

This case involves the defendant municipality's deprivation of plaintiffs' rights to due process and just compensation, secured by the Fifth and Fourteenth Amendments to the United States Constitution, under color of state law in violation of 42 U.S.C. §1983. Plaintiffs comprise all of the residential rental apartment buildings with dwelling units in excess of 100 in the City of Long Beach,

Long Island, New York (JR30).[1] As demonstrated *infra*, defendants the City of Long Beach and the City Council of the City of Long Beach ("the City") have, over a period of decades, purported to invoke and continue rent regulation of plaintiffs' property after their limited statutory authority to do so had ended. The City, bowing to political pressure from tenant groups, has made it abundantly clear that it rejects the unchallenged evidence by landlords in Long Beach that vacancies exceed 5% and that a housing emergency no longer exists; that it refuses to conduct a good faith survey or inspection of its own of vacancy rates in Long Beach; and that it will even reject the findings of its own staff when those findings confirm the landlords' contentions. The City has and continues to enforce rent regulation of plaintiffs' properties in the proven absence of a statutory defined housing emergency as to plaintiffs' classification of rental buildings, and where the City lacks constitutional or statutory authority to engage in such regulation.

As shown *infra*, the City has engaged in a decades-long pattern of law-defiant misconduct. This Court should determine whether this deliberate flouting of the law over the course of decades constitutes "egregious" or "arbitrary" official conduct, entitling plaintiffs to damages under 42 U.S.C. §1983 for the City's violation of their due process rights.

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[1] Numbers in parentheses preceded by the letter JR refer to pages of the Joint Record on Appeal in this case which was submitted to the Appellate Division, Second Department of the Supreme Court of the State of New York.

Further illustrating the City's blatant defiance of the law is its enactment of section 13-7.4 of the Ordinances of the City of Long Beach ("the Ordinance"), which combined two historically separate classifications of housing and declared that the vacancy rate in the new combined classification of 60 or more units was less than five percent, the statutory prerequisite for declaration of a housing emergency warranting the continuation of rent regulation. The Ordinance became effective on September 2, 2003, at a time when the uncontroverted record evidence showed that vacancies in the new combined class exceeded 5%. It was enacted in reliance upon an August 2003 vacancy report issued by the City, which both Supreme Court, Nassau County and the Appellate Division, Second Department held unenforceable, not issued in "good faith", and lacking in "precise data".

This Court should review the issue of whether plaintiffs are entitled to monetary damages under 42 U.S.C. §1983 for the City's violation of their civil rights by its enactment of legislation combining two previously separate classifications of residential buildings, and its declaration of a housing emergency as to that combined classification, where the Courts below expressly found that the City did not conduct the requisite "good faith" survey based on "precise data" of the vacancy rate in those buildings before it enacted the Ordinance.

In addition to the section 1983 claim for monetary damages premised on the City's denial of plaintiffs' substantive due process rights in abusively continuing rent regulation in the absence

of statutory authority to do so, this Court should also grant certiorari to review the issue of whether the City's *ultra vires* continuation of rent regulation upon plaintiffs' properties, in the face of the judicially-confirmed absence of a housing emergency, constitutes an uncompensated taking of private property under this Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) and its progeny.

STATEMENT OF THE CASE

A. Factual Background and Proceedings Below

New York State's Emergency Tenant Protection Act ("the ETPA") (McKinney's Unconsol. Laws § 8621 et seq.) was enacted in 1974 as an emergency measure, to regulate rents in communities in Nassau, Westchester, and Rockland counties in New York if and when the municipal legislative body in the respective counties has determined there are vacancies of 5% or less in classifications of residential properties containing six units or more which are designated by the municipal legislative body. At the same time, ETPA § 8623(b)(2) mandates that the municipality "must declare an end to the emergency once vacancies [in such classification] exceed five percent."

In *Roslyn Gardens Associates v. Village of Roslyn*, 190 A.D.2d 722, 593 N.Y.S.2d 301 (2d Dept. 1993), the Appellate Division, Second Department discussed the circumscribed authority given to local governments to impose rent regulation under the ETPA. The Court stated in pertinent part:

> "Although the ETPA grants a local government discretion to declare that a

housing emergency exists when a class of housing or all housing within its borders has a vacancy rate not in excess of 5% (see, McKinney's Uncons Laws of NY §8623[a]; ETPA §3[a]; L 1974, ch 576, §4, as amended), section 8623(b) states that `The emergency must be declared at an end once the vacancy rate described in subdivision a of this section exceeds five percent.' Here, the unimpeached testimony at an inquest established that the vacancy rate for all buildings in the Village currently subject to the ETPA far exceeded 5%. A local government is a political subdivision of the state. Therefore, its legislative power is circumscribed by the grant of authority from the state (*Kamhi v Town of Yorktown*, 141 AD2d 607, affd 74 NY2d 423; *Matter of Ames v Smoot*, 98 AD2d 216). The refusal by the Village to declare the housing emergency at an end is in derogation of its statutory grant of power....[T]he ETPA does not vest a local government with any discretion to either continue the emergency once the vacancy rate exceeds five percent... nor to determine the vacancy rate. Therefore, the issue was justiciable and the Supreme Court properly directed the Village to declare the emergency at an end...." (190 A.D.2d at 723-724; citations omitted).

In 1973, prior to the enactment of the ETPA, the City of Long Beach purported to enact a local ordinance regulating rents. In *Walton v. City of Long Beach*, Index No. 17681/73, Justice Kelly of the

Nassau County Supreme Court held that this 1973 enactment of rent controls was *ultra vires* and unconstitutional (JR25; JR28).

With the State Legislature's enactment of the ETPA in 1974, the City, after requesting data as to current vacancies and after finding vacancies were 5% or less in buildings with 100 and more units, declared an emergency and invoked ETPA regulation for such units (JR28-JR29; JR87). A similar ordinance, enacted in 1979 for buildings with 60 to 99 units, resulted in extension of ETPA to those buildings as well (JR29; JR87).

In January 1996, the landlords of buildings having 60-99 units and 100 or more units in Long Beach sought the termination of ETPA as to such buildings because those classifications had vacancies in excess of 5% (JR29). A City Council hearing was scheduled for March 24, 1996, was adjourned to April 2, and, thereafter, to April 16 (JR29). However, as a result of pressure from tenant groups, including forces outside of Long Beach, on April 16, 1996 the City Council, in violation of its obligation to declare ETPA rent regulation at an end "once vacancies exceed five percent", adjourned the hearings "until eternity" (JR29).

The affected landlords, which included some of the plaintiffs herein, commenced an action in Supreme Court, Nassau County against the City of Long Beach and its City Council. That action, entitled *Executive Towers at Lido, et al. v. City of Long Beach*, Index No. 26461-98, was tried by stipulation before Hon. Eli Wager as Referee (JR8; JR29; JR56-JR76; JR334).

By resolution on August 15, 2000, while the litigation before Justice Wager was in progress and when the City recognized that it was losing the case, the City adopted an ordinance, effective September 1, 2000 (Resolution 183/00), declaring that vacancies in buildings with 100 or more units "continued" to have vacancies of 5% or less and, thus, were subject to ETPA (JR6; JR29).

In January 2001, Justice Wager determined from the evidence presented at trial that ETPA vacancies as of March, April, May and June 1996 were in excess of 5% for the 100 or more unit buildings (JR8; JR65-JR69). Justice Wager awarded monetary damages to plaintiffs because of the loss of rent resulting from the City's refusal as mandated by the ETPA statute to declare an end to the emergency once vacancies exceeded 5% (JR85-JR86).

The City appealed to the Appellate Division, Second Department from the resultant Judgment, and plaintiffs cross-appealed insofar as the Judgment failed to grant awards for prejudgment interest and diminution in plaintiffs' property values (JR12; JR30; JR362). The appeal in *Executive Towers At Lido, LLC v. City of Long Beach,* 11 A.D.3d 651, 784 N.Y.S.2d 130 (2d Dept. 2004), app. den. 4 N.Y.3d 707, 829 N.E.2d 673, 796 N.Y.S.2d 580 (2005), was decided by the Appellate Division on October 25, 2004.

The Court's decision left the Judgment unchanged except to strike the monetary damages which had been granted as "a private right of action under the Act", and to strike June 1996 as a month showing vacancies in excess of five percent. The Appellate Division, stating that the damage claim

asserted "a private cause of action under the Act [ETPA]", held that it was governed by *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 541 N.E.2d 18, 543 N.Y.S.2d 18 (1989), which required a showing of legislative intent to permit such relief. Finding an absence of such intent, the Appellate Division dismissed the damage claim.

On January 2, 2003, plaintiffs alerted the City that the vacancy rate in their buildings exceeded 5% and, thus, that the City was obliged to declare rent regulation at an end (JR11; JR30; JR87; JR236-JR238). They presented the data as to the vacancies and invited confirmation by review of the supporting records and physical visits (JR11; JR30; JR87; JR236-JR238).

Plaintiffs continued to supply vacancy data to the City for the months of February, March, April and May, 2003, while requesting that the City desist from its unconstitutional and illegal conduct in continuing ETPA after its authority to regulate ended under the enabling statute (JR31; JR111-JR112). Plaintiffs submitted, among other things, month-by-month data showing the vacancies, the details as to the leases, the months when tenants moved out, the advertising and other efforts to re-rent, and other relevant data (JR31; JR111-JR112). Plaintiffs repeatedly invited the City to inspect the vacancies in their buildings and to review the data in their records (JR31). The City refused to accept these invitations.

Instead of inquiring as to the factual evidence of the vacancies, the City, like the 1996 City Council which adjourned the matter "until eternity", invited the public to submit their opinions on the statutorily

irrelevant issue of the desirability of continuing ETPA (JR31). A hearing was scheduled for March 4, 2003 (JR31; JR42). At that hearing, the only factual evidence as to vacancies presented was the data provided by plaintiffs (JR31; JR42). The March 4th hearing was adjourned to April 15, 2003. That hearing, likewise, adduced no relevant evidence as to vacancies, except as provided by plaintiffs (JR31; JR42). The April 15 hearing was further adjourned to May 6, 2003 (JR31; JR42). Again, there was no factual testimony as to vacancies except the data from plaintiffs, which supported the plaintiffs' claims (JR31; JR42). The hearings consisted primarily of objections by tenants that rents were too high, but nothing relevant to the percentage of vacancies (JR31; JR42).

In May 2003, after the City had received large amounts of data from plaintiffs and had conducted its March 4, April 15 and May 6 hearings, all of which supported plaintiffs, and yet continued in its *ultra vires* continuation of ETPA rent regulation, plaintiffs brought the present action (JR41). Plaintiffs' complaint recited the vacancies in excess of 5% for January, February, March, April and May, 2003, the stream of data supplied by plaintiffs in connection therewith, the invitations to inspect plaintiffs' premises and records, and the absence of contrary data presented at any of the hearings (JR43).

The City then designated two of its employees to investigate and report as to plaintiffs' vacancies. The two City investigators submitted a report concluding that the vacancies "were consistent with the claims made by the owners" (JR101-JR102).

The City then issued a "Report" dated August 15, 2003 (JR87-JR106), which bore the title "Findings and Conclusions Regarding Vacancy Rates in the City of Long Beach For Buildings with 100 or More Units." The Report conceded that in April-May and July, 2003, the City had assigned its employees to make visits or telephone calls to various buildings. They had reported, as to the buildings of plaintiffs, "the numbers... were consistent with the claims made by the owners" (JR101-JR102).

Apart from the two affidavits of the City employees, which the City conceded "were consistent with the claims made by the owners" (JR102), the Report contained no factual evidence of vacancies during the period January- May, 2003. The Report nevertheless announced what was manifestly an unfounded and predetermined conclusion. It baldly stated that combined vacancy rates for buildings containing 100 and more units and those containing 60-99 units had not exceeded 5% (JR102-JR103). The Report contained not one fact adduced by the City to controvert the detailed data presented by plaintiffs for January, February, March, April or May, 2003. The City failed to even present any version of its own survey of vacancies for any of those months. In fact, in its Decision dated October 5, 2005, Supreme Court, Nassau County described the Report as more nearly resembling "a legal argument or brief than findings of fact" (see Appendix, page 24a).

What is more, the City's "exhaustive study" made no effort to identify the persons participating or records examined by them. Unable to find support in any testimony of the hearings from March through May, or from the visits of its own personnel,

the City resorted to patently irrelevant conclusory information from the census of 2000, to generalities about inapplicable geographical areas including the City of New York, and to irrelevant Division of Housing And Community Renewal statistics for April 1, 2000 and April 1, 2001, instead of 2003 statistics (JR37; JR40; JR99-JR101; JR169). Far from relying upon "objective" statistics for 2003, the City conceded that it relied on purported "historical" data unrelated to the January, February, March, April and May 2003 statistics (JR100-JR101).

The errors in the "Report" were compounded when the City, without additional data, concluded that it could buttress its resistance to plaintiffs' factual evidence by changing the playing field. By Resolution and Ordinance passed on August 19, 2003 and effective September 2, 2003 (JR107-JR109; R270-R273), the City arbitrarily combined the formerly separate 60-99-unit building classification with the 100 and more unit building classification to form a single classification, and, without the slightest foundation in evidence of vacancies less than 5%, declared the continued existence of a housing emergency in buildings with 60 or more units. [2]

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[2] The City apparently (and incorrectly) assumed that there would be fewer vacancies in the 60- 99-unit buildings and thus, the landlord's burden to show in excess of 5% vacancies would be substantially increased. The assumption was factually erroneous, as the Record shows (JR50-JR55). As of September 2, 2003, the effective date of the new enlarged classification, the vacancy rate in both the 60-99 and 100+ unit classifications exceeded 5%. With respect to the 100+ unit category, the vacancy rate as of September 1, 2003 was 5.22% and the vacancy rate remained in excess of 5% through August

In view of the additional circumstances described above, plaintiffs served an Amended Verified Complaint dated October 7, 2003 (JR12; JR182-JR210), in which they sought, among other things, to recover damages for violations of plaintiffs' civil rights pursuant to 42 U.S.C. §1983, and for a judgment declaring that the housing emergency with respect to plaintiffs' class of residential buildings is at an end.

In September 2004, plaintiffs moved for an Order granting partial summary judgment, (i) requiring the City to declare that as to buildings with 100 or more units, vacancies in ETPA regulated units exceeded five percent in January, February, March, April, and May 2003 and for each month from and including September 2003 through September 2004; (ii) declaring an end to the housing emergency declared by the City in 1974 and purportedly extended in 2000; and (iii) declaring null and void the Resolution effective September 2, 2003 combining the 60-99 unit classification with the 100-and-more unit classification (JR21-JR156).

2004, at the earliest (JR50-JR51). Further, as of September 1, 2003, the vacancy rate in the 60-99 unit buildings was over 5% (JR54). For the new enlarged classification combining the 60-99 unit buildings with the 100+ unit buildings, the vacancy rate was 5.16% as of September 1, 2003 and remained well above 5% for every month thereafter until July 2004, at the earliest (JR54-JR55). Thus, the joinder of the 60-99 unit buildings with the 100-and-over buildings, contrary to the City's expectation, did not result in a new classification with vacancies of 5% or below. Rather, the vacancy rate was over 5%. The City adduced no evidence below to dispute these figures.

In support of their motion, petitioners submitted precise factual evidence showing that vacancies in the 100 and over unit buildings had exceeded 5% from January 2003 through May 2003 and September 2003 through August 2004 (JR52-JR55). Plaintiffs also adduced evidence showing that vacancies in the combined 60-99 unit and 100 and over unit building classification had exceeded 5% from September 2, 2003 (the effective date of the Resolution combining the two previously separate classifications) through July 2004 (JR53-JR55).

In their papers submitted to the Court on the motion for partial summary judgment, plaintiffs argued that the City had violated 42 U.S.C. §1983 in that the City violated plaintiffs' constitutional rights to due process and had engaged in an uncompensated taking of plaintiffs' property (JR23-JR30; JR280-JR282; JR345-JR351; JR370-JR371; JR374-JR375).

B. The Decisions of the Courts Below

By Order entered October 5, 2005 (see Appendix, pages 14a-38a), Supreme Court, Nassau County (Hon. Geoffrey J. O'Connell, J.) found that the plaintiffs had indeed proven that vacancies in the months of January, February, March, April and May, 2003 were in excess of 5%, but (a) dismissed plaintiffs' claims of violation of their civil rights under 42 United States Code §1983; (b) dismissed plaintiffs' claims for monetary damages arising from the City's unconstitutional and *ultra vires* continuation of rent regulation of plaintiffs' buildings; and (c) refused to declare that the Resolution combining the previously distinct classifications of buildings having 60 to 99 dwelling

units and those having 100 or more dwelling units into a single classification is null and void.

Justice O'Connell, citing to the decisions of the New York Court of Appeals and the Appellate Division, Second Department in *Spring Valley Gardens Associates v. Marrero*, 68 N.Y.2d 627, 496 N.E.2d 16, 505 N.Y.S.2d 57 (1986), affg. 100 A.D.2d 93, 474 N.Y.S.2d 311 (2d Dept. 1984), and *Colonial Arms Apts. v. Village of Mt. Kisco*, 104 A.D.2d 964, 480 N.Y.S.2d 895 (2d Dept. 1995), stated that the municipality was not free to simply declare a housing emergency without undertaking some effort to determine the vacancy rate (Appendix, page 28a). According to *Spring Valley* and *Colonial Arms*, a legislative declaration of a housing emergency "must be based upon a good-faith study, a common sense approach and precise data" (Appendix, page 28a). Indeed, in *Spring Valley, supra*, 68 N.Y.2d 627, 629, a case involving judicial review of a municipality's resolution to impose rent regulation on certain apartment buildings, the Court of Appeals rejected defendant's argument regarding the "presumption of validity of legislative acts", stating:

> "that presumption cannot be applied in a case such as this where the implementing legislation requires the local legislative body to first make a particular factual finding".

Justice O'Connell concluded in the instant case that it could not be said that the City's August 2003 Report met the mandated test of "a good faith study...based on precise data...." (Appendix, page 36a). The Court noted that the City did not undertake any survey of vacancies until May 2003 and surveyed only vacancies existing in May and

July of 2003 (35a). Said the Court, "The information derived from these surveys was never organized and presented in a coherent format" (*Ibid.*). It was never correlated to the plaintiffs' specific claims or reduced to even an approximate vacancy rate (36a). The surveys provided no basis for discounting the vacancy figures supplied by plaintiffs for the months from December 2002 through April 2003 (*Ibid*). The Court rejected the Report's bald allegations, made without any evidentiary proof whatsoever, that there may have been distortion or manipulation of data by the plaintiffs (Appendix, page 35a).

The Court stated:

> "Based on this record the Court is constrained to hold that the 5% threshold was in fact crossed during a period in excess of three months during the period of January through May of 2003 and the `emergency' should have been declared at an end" (Appendix, pages 36a-37a).

However, the Court stated, without elaborating further, that the City's official conduct was insufficiently "egregious" to entitle plaintiffs to damages for their civil rights claim, and that the claim for such damages was dismissed (*Ibid.*).

The Court noted with "bemusement" that the City was now arguing that the separate classifications for 60 to 99 unit buildings and 100 or more unit buildings was merely a "historical accident", while the City had previously argued before the same Court that there was a sound and rational basis for the separate classifications (Appendix, page 37a). The Court nevertheless stated that the City's decision to combine the two

classifications was a legislative act which would be presumed to be valid (*Ibid*).

Plaintiffs appealed from the Order to the Appellate Division, Second Department, and the City cross-appealed from the same Order insofar as the Court held that the vacancy rate in the buildings owned by plaintiffs exceeded 5% for a period in excess of three months from January through May 2003, and that the City should have declared the end of rent regulation under the ETPA (JR3; JR19). As they did in Supreme Court, Nassau County, plaintiffs argued that they were entitled to monetary damages for the City's violation of 42 U.S.C. §1983 in violating plaintiffs' rights to due process and effecting an uncompensated regulatory taking of plaintiffs' property (see Appellants' Brief to Appellate Division, pp. 32-53).

In its decision entered February 20, 2007 (*Executive Towers at Lido, LLC v. City of Long Beach, supra,* 37 A.D.3d 650; Appendix, pages 4a-9a) the Appellate Division held that:

> "plaintiffs established, as a matter of law, that the vacancy rate for residential buildings with 100 or more units exceeded 5% from January 2003 through May 2003" (Appendix, page 7a).

The Court held that the City had failed to raise a triable issue of fact in opposition to plaintiff's showing. The Appellate Division recognized the abject failure of the City to conduct a good faith investigation to determine the vacancy rate; that the "findings" ultimately made in the City's August 2003 Report were a sham, without foundation in fact or evidence; and that the City had been required to

declare an end to the applicability of ETPA rent restrictions (Appendix, page 7a). As shown *infra*, where the Appellate Division erred was in its failure – notwithstanding the City's clear and manifest history of purposeful, obdurate refusal to comply with ETPA §8623(b)(2) – to recognize that plaintiffs' constitutional rights had been violated, entitling them to seek recovery of damages under 42 U.S.C. §1983.

The Appellate Division confirmed Supreme Court's finding that the City's August 2003 survey of vacancies was not a "good faith study" based upon "precise data", and that the City's survey provided no basis for a finding of less than 5% vacancies (Appendix, page 7a). Among other things, the City "did not set forth collected data in an organized and coherent format and made no attempt to correlate the data in response to plaintiffs' specific claims" (*Ibid.*). The Appellate Division recognized that the City's purported reclassification, uniting 60-99 unit buildings with 100+ unit buildings in the new Ordinance and declaring an emergency with respect to that new classification, was based entirely on the City's bogus August 2003 Report which the Court had declared was not a good-faith study ("...[T]he City, relying on the August 2003 report, passed a resolution declaring an ongoing housing emergency for the newly-created class of residential buildings containing 60 or more units" [Appendix, page 7a]). The Appellate Division, however, failed to recognize that the Ordinance was therefore fatally infirm and was yet another manifestation of the City's effort at all costs, in derogation of ETPA §8623(a) and of plaintiffs' constitutional rights, to continue rent

regulation. The Appellate Division declined to declare the Ordinance invalid and unenforceable (Appendix, page 8a).

The Appellate Division's Order further provided for entry of a judgment declaring that the vacancy rate for the class of residential buildings in the City of Long Beach with 100 or more units exceeded 5% for a period from January through May 2003, and that "the housing emergency is at an end with respect to that class of residential buildings" (Appendix, page 8a). Thus, the Appellate Division, in effect, sidestepped the politically unpopular task of declaring the termination of rent regulation in Long Beach, by the simple expedient of declaring that the housing emergency was at an end with respect to the 100 or more unit classification of buildings, a classification of housing that no longer existed by dint of the City's enactment of the September 2, 2003 Ordinance which the Court upheld.

Thereafter, in accordance with the Appellate Division's directive, Supreme Court, Nassau County rendered a Judgment entered April 10, 2007 (Appendix, pages 10a-13a). By Notice of Motion dated May 9, 2007, plaintiffs timely moved at the Appellate Division, Second Department for leave to appeal to the New York State Court of Appeals. By Order dated July 13, 2007, the Appellate Division denied plaintiffs' motion for leave to appeal (Appendix, pages 2a-3a). By Order dated November 15, 2007, the Court of Appeals denied plaintiffs' motion, brought directly at the Court of Appeals, for leave to appeal to that Court from the Judgment (9 N.Y.3d 813 [2007]; Appendix, pages 1a).

REASONS FOR GRANTING THE WRIT

The dismissal by the Courts below of plaintiffs' section 1983 claim effectively announces that a governmental entity which unconstitutionally, knowingly and purposefully acts in an *ultra vires* manner by continuing to apply rent regulation after its statutory authority to do so has terminated, may act with impunity and will not be required to respond in damages for that illegal conduct. The dismissal of plaintiffs' claim under section 1983 effectively announces that landlords whose constitutional rights have been adversely impacted by the *decades-long* illegal regulatory taking of their property will have no restitution or effectual remedy whatsoever. The dismissal of the section 1983 claim fosters disobedience and defiance by local officials of the plain, unequivocal statutory limitations on the powers of such officials with respect to rent regulation. It encourages them to act in an unconstitutional, rogue and renegade manner in pandering to their voting constituencies by continuing rent regulation which is popular with tenant voters, regardless of its illegality. For these reasons among others, this case presents issues of national constitutional importance which are worthy of and need review by the highest Court of the land.

Here, the City of Long Beach has *three times* purported to invoke and continue rent regulation of plaintiffs' property in the absence of statutory authority to do so. The first was in 1973, prior to the enactment of the ETPA statute -- that attempt resulted in a pointed and express judicial declaration that the rent regulation was *ultra vires* and unconstitutional (JR25; JR28). The second illegal

continuance of rent regulation was in 1996, when, confronted with the landlords' evidence of vacancies in excess of 5%, the City Council determined to adjourn resolution of the issue of termination of rent regulation "until eternity" (JR29). The third instance was in 2003, when, again confronted with evidence of vacancies in excess of 5%, the City once more determined to ignore the evidence and to continue the imposition of rent regulation in the absence of statutory authority to do so (JR31; JR111-JR112).

Further evidence of defendant's willful defiance of the law is its attempt in August 2003 to change the playing field by passing the Ordinance, which combined the formerly-separate 60- to 99-unit category of buildings with the 100 and more unit category to form a single classification, and declared a purported housing emergency as to that combined classification (JR12; JR107-JR109). The City enacted the Ordinance without conducting any good faith survey whatsoever regarding the vacancy rate in either the 100+ unit class, the 60-99 unit class, or the new combined class of 60 and over units. This constitutes yet another demonstration of the defendant's longstanding pattern and practice, in violation of plaintiffs' civil rights, of manipulating and violating the ETPA in order to continue the imposition of rent regulation on plaintiffs' property in the absence of statutory authorization to do so.

Notably, both Supreme Court, Nassau County and the Appellate Division, Second Department specifically found that vacancy rates in plaintiffs' buildings had in fact exceeded 5% for a substantial period of time in both 1996 and 2003, and thus plaintiffs' evidence regarding the absence of a

housing emergency stands uncontroverted. Further, both Courts acknowledged that the City never conducted the requisite "common sense analysis of precise data derived from a good faith survey" in this case. Those Courts, nevertheless, refused to declare the Ordinance invalid and unenforceable and refused to award monetary damages to plaintiffs under section 1983 for the defendant's willful violation of their civil rights in continuing rent regulation on plaintiffs' buildings without statutory authority to do so, finding the City's behavior insufficiently "egregious".

With all due respect to the Courts below, the City has engaged in a demonstrated pattern of willful law-defiant conduct. The Courts below had the obligation to protect plaintiffs' due process rights and to make them whole from the unconstitutional violations by government officials, even where the issue involved is the politically-charged issue of rent regulation. They failed to do so. This Court should therefore review plaintiffs' claim that they are entitled to monetary damages under section 1983 as a result of the City's violation of plaintiffs' constitutional rights in abusively continuing rent regulation in the absence of statutory authority to do so. This Court should also consider the issue of whether plaintiffs are entitled to monetary damages for a municipality's violation of their constitutional rights under §1983, where that municipality, in an attempt to perpetuate the imposition of rent regulation in the absence of statutory authority to do so, arbitrarily consolidates formerly separate classifications of housing and declares a housing emergency as to the consolidated classification,

where the vacancy study on which it purports to rely is expressly found by the Courts below to be completely lacking in the prescribed prerequisites of "good faith" and "precise data".

A. This Court Should Consider Plaintiffs' Claim Under 42 U.S.C. §1983 That the City Violated Plaintiffs' Rights to Substantive Due Process.

The Fifth Amendment of the Constitution, made applicable to the states by the Fourteenth Amendment, provides that no person "shall be deprived of ...property, without due process of law." The City never disputed in the Courts below that the right of plaintiffs to rental income from the real estate they choose to rent is a property right protected by the due process clause of the Constitution (JR206-JR207; JR348).

Regulation of rents is a state function in which a municipality may participate only if, and to the extent, permitted by state statute (*Spring Valley Garden Associates v. Marrero, supra,* 100 A.D.2d 93, affd. 68 N.Y.2d 627; see also, *Roslyn Gardens Associates v. Village of Roslyn, supra,* 190 A.D.2d 722; *Colonial Arms Apts. v. Village of Mt. Kisco, supra,* 104 A.D.2d 964). There being no inherent power to enact such regulation, an ordinance or local law provision for which legislative delegation of power cannot be found, is *ultra vires* and void (*Kamhi v. Town of Yorktown,* 74 N.Y.2d 423, 427, 547 N.E.2d 346, 548 N.Y.S.2d 144 [1989]).

Rent regulations such as those imposed by the City cannot comport with due process where, as here, they are *ultra vires,* arbitrary and without proper governmental foundation. As shown by the

Record in this case, the City acted in excess of its authority under the Constitution and State law, for political motives and without a legitimate public basis. It unlawfully asserted discretionary rights to continue rent regulation when its authority was non-discretionary and had ended. Defendant, in effect, has made ETPA regulation of plaintiffs' units permanent even in the face of unquestionable statutory constraints and repeated evidentiary showings that it lacks authority under the Constitution and ETPA statute to continue imposition of rent regulation. The City, in refusing to declare the end of the emergency despite the uncontradicted evidence of vacancies in excess of five per cent, has violated plaintiffs' property interests by depriving them of the opportunity to make the best use of their property by renting those units at the rents which the market commands. The City has thereby violated plaintiffs' rights to substantive due process protection under the Constitution.

This Court in *City of Cuyahoga Falls v. Buckeye Comty. Hope Found.*, 538 U.S. 188, 198-199, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003) held that in order to maintain a claim premised upon a governmental entity's violation of substantive due process rights, the plaintiff must show that the defendant's actions "constituted egregious or arbitrary government conduct." The Courts below, in dismissing plaintiffs' section 1983 claim, apparently believed that the City's conduct was insufficiently "egregious" to support the claim.

With due respect to the Courts below, plaintiffs have adduced evidence of a repeated historical pattern by the City of ignoring evidence of vacancies

in excess of 5% and in continuing to impose rent regulation *ultra vires*. The City has *three times* purported to invoke and continue rent regulation of plaintiffs' property in the absence of statutory authority to do so. The continued imposition of rent regulation here was plainly "egregious" or "arbitrary". It was brazenly violative of the ETPA statute in view of the uncontradicted evidence of vacancies in excess of 5%. It was plainly motivated by improper political motives to forestall "until eternity" the termination of rent regulation in Long Beach. The City deliberately flouted the express limitation on its authority set forth in the enabling statute in its efforts to obstruct the plaintiffs from obtaining the return on their property to which they are constitutionally entitled.

In analogous situations, the federal circuit courts of appeal have found "arbitrary" or "irrational" government actions as denying substantive due process rights, even where no express limiting statute is involved. See e.g., *Del Monte Dunes v. City of Monterey,* 920 F.2d 1496 (9th Cir. 1990) (Court reversed the judgment of the district court which had dismissed plaintiff's section 1983 claim based on violations of substantive due process, finding that issues of fact for the jury were presented as to whether defendant's denial of permit was motivated not by legitimate regulatory concerns but by political pressures and was therefore arbitrary and irrational); *Brady v. Town of Colchester,* 863 F.2d 205 (2d Cir. 1988) (plaintiffs filed suit under section 1983, claiming among other things violation of substantive due process; trial court granted summary judgment for defendants; the Court of

Appeals for the Second Circuit reversed the dismissal of the substantive due process claim and remanded, holding that there were factual issues with respect to the claims; the Court stated that the facts of the case suggested that plaintiffs might be able to prove that they were denied a permit and use of their property not because of a good faith mistake on the part of defendants about the applicable law, but because of indefensible reasons such as political animus); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (plaintiff developer brought suit under section 1983 seeking damages for deprivations of constitutional rights when County Council halted issuance of permit pending consideration of a rezoning of the proposed building site; the district court granted summary judgment to defendant dismissing plaintiff's due process claim; the Court of Appeals for the Fourth Circuit reversed and reinstated the claim, finding triable issues of fact with respect to whether defendant acted arbitrarily or unfairly in denying the permit; said the Court, "Arbitrariness, abuse of discretion, caprice or unfairness giv[e] rise to a constitutional claim [of denial of substantive due process in state permit processing actions]" [716 F.2d at 1419]).

Similarly, the New York Court of Appeals in *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 665 N.E.2d 1061, 643 N.Y.S.2d 21 (1996), affirmed a judgment holding the Town liable for damages resulting from the violation of a developer's substantive due process rights when the Town, in pandering to the organized and vociferous demands of a group of protesting residents, unlawfully revoked a previously granted permit. The Court,

citing precedent from this Court, stated that due process assures a property owner the right to be free from arbitrary or irrational municipal actions destructive of their property interest (88 N.Y.2d at 53). A municipality's decision regulating a landowner's use of its property offends due process when the government acts with no legitimate reason for its decision (*Ibid.*). The Court in *Magee* held that the Town's revocation of the developer's permit violated 42 U.S.C. §1983 because it was without legal justification and was motivated entirely by political concerns (*Ibid.*).

This Court should grant the instant petition for a writ of certiorari to consider the issue of whether a municipality's *decades-long* deliberate flouting of the law in continuing to impose rent regulation on plaintiffs' buildings in the absence of statutory authority to do so, which was motivated solely by improper political concerns, constitutes "egregious" or "arbitrary" official conduct, entitling plaintiffs to damages under 42 U.S.C. §1983 for violation of their due process rights. This Court should further consider the issue of whether a municipality's enactment of an ordinance declaring the existence of a new combined housing classification and declaring a housing emergency with respect to that new combined class, constitutes "egregious" or "arbitrary" conduct under section 1983 when the ordinance is enacted in the complete absence of any "good faith" survey with "precise data" of the vacancy rate in the new combined classification.

B. This Court Should Further Grant Review of Plaintiffs' Claim That the City Effected a Penn Central "Regulatory Taking" Of Plaintiffs' Property.

This Court should also consider plaintiffs' claim that the City's *ultra vires* and unconstitutional continuation of rent regulation upon plaintiffs' properties in the demonstrated absence of a housing emergency constitutes an uncompensated taking of private property. The "Takings Clause" of the Fifth Amendment to the Constitution – applicable to the States and their political subdivisions through the Fourteen Amendment, *Chicago, Burlington and Quincy Railroad v. Chicago,* 166 U.S. 226, 236, 17 S.Ct. 581, 41 L.Ed.2d 979 (1897) -- provides, "nor shall private property be taken for public use, without just compensation".

As this Court recognized in *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), the paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property (see, for example, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 [1982], where this Court held that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second per se taking applies to regulations that completely deprive an owner of "all economically beneficial use" of his or her property (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 [1992]).

Outside of these two relatively narrow categories, regulatory takings challenges are generally governed by the standards set forth in *Penn Central Transp. Co. v. New York City, supra*, 438 U.S. 104. In *Penn Central*, this Court stated that there was no "set formula" for evaluating regulatory takings claims, but identified several factors that have particular significance. Primary among those factors are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. *Penn Central* further noted that "the character of the governmental action" – for instance, whether it attempted to redress an essentially public problem by burdening particular individuals – may also be relevant in determining whether a taking has occurred (*Ibid.*).

In *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 393, 643 N.E.2d 479, 618 N.Y.S.2d 857 (1994), the New York Court of Appeals, applying *Penn Central*, held unconstitutional a provision in the ETPA which required certain owners of ETPA-regulated residential buildings to offer renewal leases to defendant Lenox Hill Hospital, a not-for-profit hospital, for apartments occupied by the hospital's employees. In holding the provision unconstitutional, the Court stated in pertinent part:

> "Elementary and strong constitutional principles protect private property rights and govern takings of property for public use without just compensation. They evolved `to bar Government from forcing some people alone to bear public burdens which, in all

> fairness and justice, should be borne by the public as a whole'" (*Penn Cent. Transp. Co. v New York City*, 438 US 104, 123, quoting *Armstrong v United States*, 364 US 40, 49; *Seawall Assocs. v City of New York*, 74 NY2d 92, 101, cert denied sub nom. *Wilkerson v Seawall Assocs.*, 493 US 976, supra)" (84 N.Y.2d at 391).

The Court in *Manocherian* stated that "Purporting to promote the general public welfare by enabling not-for-profit hospitals to continue to provide subsidized housing benefits to its chosen employees cannot sustain the sweep and manner of the burden and confiscation effected against the few owners" (84 N.Y.2d at 394). The Court stated that the fact that the Legislature had acted

> "through the `landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere `economic regulation', which can disproportionately burden particular individuals' (*Pennell v. San Jose*, 485 U.S. 1, 22; see also, *Penn Central Transp. Co. v. New York City*, 438 US 104, 124, supra)" (84 N.Y.2d at 396).

Here, similarly, the City of Long Beach, in an effort to placate and protect the interests of a small but militant group of tenants living in rent-regulated apartments in luxury buildings, refused to make the mandated declaration ending ETPA controls. This clearly is an improper "regulatory taking" which has disproportionately burdened the landlords of those buildings. It imposes, in effect, mandatory

subsidizing by individual property owners of individual tenants.

The City never refuted plaintiffs' showing below that the illegal continuance of rent regulation has had an adverse "economic impact" upon plaintiffs and has interfered with their "investment-backed expectations", in that market rents for the plaintiffs' apartments exceed those allowed under ETPA by at least twenty percent. Nor has the City disputed plaintiffs' showing that the improper continuation of ETPA as to these rents prohibits plaintiffs from making desired major capital improvements to their buildings in order to maintain their properties (JR187-R188; JR293). This Court has made clear that there is constitutional protection for a landowner's "investment-backed expectations" *(Penn Central, supra,* at 127; *Loretto, supra,* 458 U.S. at 426).

In prior precedent, this Court has indicated that a section 1983 claim is maintainable premised upon violations of the Takings Clause of the Fifth Amendment, when a governmental entity acts "outside the bounds of its authority" in taking private property for public use, or when a governmental entity, acting pursuant to proper authorization, takes private property for public use without providing just compensation (see e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 722, 119 S.Ct. 1624, 143 L.Ed.2d 882 [1999] [upholding a jury verdict in favor of respondent developer alleging claim under 42 U.S.C. §1983 for uncompensated regulatory taking in violation of the Fifth Amendment]). This Court should accordingly grant the petition in order that

this Court may consider the issue of whether the City's illegal and *ultra vires* imposition of rent regulation constitutes an unconstitutional taking of property without just compensation, entitling plaintiffs to an award of monetary damages.

CONCLUSION

In conclusion, the history of this case, involving decades-long politically-motivated misconduct by the City's officials in their continued re-enactment of rent regulation upon plaintiffs' private property without the statutory underpinning to do so, presents constitutional issues of national significance which should be determined by this Court. As a result of the unconstitutional refusal by the City to terminate rent regulation in the proven absence of a housing emergency, the plaintiff landlords have sustained severe damage but are left without any remedy unless remedy is granted under 42 U.S.C. §1983. The petition for a writ of certiorari should accordingly be granted.

Respectfully submitted,

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9 N. Y.3d 813; 878 N.E.2d 608;
*2007 N.Y. LEXIS 3240, **

Executive Towers at Lido, LLC, et al.,
Appellants-Respondents,
v.
City of Long Beach et al.,
Respondents-Appellants.

Mo. No. 1070
COURT OF APPEALS OF NEW YORK
9 N.Y.3d 813; 878 N.E.2d 608; 2007 N.Y. LEXIS 3240
November 15, 2007, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Executive Towers at Lido, LLC v. City of Long Beach, 37 A.D.3d 650, 2007 N.Y. App. Div. LEXIS 2107 (N.Y. App. Div. 2d Dep't, 2007)

OPINION
[*1]

Motions for leave to appeal denied.

Executive Towers at Lido, LLC v City of Long Beach

Motion No: 2005-10449

Slip Opinion No: 2007 NYSlipOp 73608(U)

Decided on July 13, 2007

Appellate Division, Second Department, Motion Decision

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

This motion is uncorrected and is not subject to publication in the Official Reports.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department
M57110
E/sl
ROBERT W. SCHMIDT, J.P.
REINALDO E. RIVERA
JOSEPH COVELLO
RUTH C. BALKIN, JJ.

2005-10449

Executive Towers at Lido, LLC, et al., appellants-respondents, v City of Long Beach, et al., respondents-appellants.

DECISION & ORDER ON MOTION

(Index No. 7977/03)

Motion by the appellants-respondents for leave to appeal to the Court of Appeals from a decision and order of this court dated February 20, 2007, which determined an appeal and cross appeal from an order of the Supreme Court, Nassau County, entered October 5, 2005. Cross motion by the respondents-appellants for leave to reargue the appeal and cross appeal, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the cross motion, and the papers filed in opposition thereto, it is

ORDERED that the motion and the cross motion are denied.

SCHMIDT, J.P., RIVERA, COVELLO and BALKIN, JJ., concur.

ENTER:
James Edward Pelzer
Clerk of the Court

Executive Towers at Lido, LLC v City of Long Beach

2007 NY Slip Op 01514 [37 AD3d 650]

February 20, 2007

Appellate Division, Second Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, April 11, 2007

Executive Towers at Lido, LLC, et al., Appellants-Respondents,
v
City of Long Beach et al., Respondents-Appellants.

[*1] Herzfeld & Rubin, P.C., New York, N.Y. (Herbert Rubin, David B. Hamm, Linda M. Brown, and Martin A. Shlufman of counsel), for appellants-respondents.

Rosenberg Calica & Birney, LLP, Garden City, N.Y. (Ronald J. Rosenberg and William J. Birney of counsel), for respondents-appellants.

In an action, inter alia, to recover damages for civil rights violations pursuant to 42 USC § 1983, and for a judgment declaring that the vacancy rates of certain classes of residential buildings in the City of Long Beach exceed 5% and that the housing emergency declared pursuant to the Emergency

Tenant Protection Act of 1974 § 3 (L 1974, ch 576, § 4 [§ 3]; McKinney's Uncons Laws of NY § 8623) is at an end, the plaintiffs appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (O'Connell, J.), entered October 5, 2005, as granted that branch of the defendants' cross motion which was for summary judgment dismissing their cause of action alleging civil rights violations pursuant to 42 USC § 1983, and as, upon finding, in effect, that section 13-7.4 of the Ordinances of the City of Long Beach is valid and enforceable, denied that branch of their motion which was for partial summary judgment declaring that section 13-7.4 of the Ordinances of the City of Long Beach is invalid and unenforceable, and the defendants cross-appeal, as limited by their brief, from so much of the same order as granted that branch of the plaintiffs' motion which was for partial summary judgment declaring that the vacancy rate in the City of Long Beach for residential buildings with 100 or more units exceeded 5% for a period of time in excess of three months from January 2003 through May 2003, and that the housing emergency is at an end with respect to that class of residential buildings.

Ordered that the order is affirmed, without costs or disbursements, and the matter [*2]is remitted to the Supreme Court, Nassau County, for the entry of an appropriate judgment declaring that section 13-7.4 of the Ordinances of the City of Long Beach is valid and enforceable and that the vacancy rate in the City of Long Beach for residential buildings with 100 or more units exceeded 5% for a period of time in excess of three months from

January 2003 through May 2003 and that the housing emergency is at an end with respect to that class of residential buildings.

The Emergency Tenant Protection Act of 1974 (L 1974, ch 576, § 4 [hereinafter ETPA]) allows a local government of a city, town, or village outside of the City of New York with a population of less than 1,000,000 people, and thus not covered by any other state rent-control or stabilization law, discretion to declare a housing emergency within the relevant city, town, or village, thus subjecting all non-exempt housing to ETPA regulations. In 2000 and 2001 the City of Long Beach made separate declarations that a housing emergency existed with respect to the class of residential buildings with 60 to 99 units, and the class of residential buildings with 100 or more units. Pursuant to ETPA § 8623, the City "must" declare the emergency at an end "once" the vacancy rate exceeds 5% (*see* Unconsolidated Laws § 8623 [b]; *Roslyn Garden Assoc. v Board of Trustees of Inc. Vil. of Roslyn*, 190 AD2d 722, 723 [1993]). Here, the plaintiffs, who own six apartment buildings in the City that each contain 100 or more units, submitted proof to the City that the vacancy rate in the City for that class of residential buildings with 100 or more units from January 2003 through May 2003 exceeded 5%. Thereafter, in a report issued in August 2003, the City found that the vacancy rate for that class of residential buildings had not exceeded 5%.

Also in August 2003 the City enacted section 13-7.4 of the Ordinances of the City of Long Beach, thereby consolidating two ETPA classifications, i.e.,

residential buildings with 60 to 99 units and residential buildings with 100 or more units, into a single classification consisting of all residential buildings with 60 or more units. At the same time, the City, relying on the August 2003 report, passed a resolution declaring an ongoing housing emergency for the newly-created class of residential buildings containing 60 or more units.

The plaintiffs established, as a matter of law, that the vacancy rate for residential buildings with 100 or more units exceeded 5% from January 2003 through May 2003. In reaching a determination as to whether to declare or end an ETPA housing emergency, a municipality need not conduct a "complete survey" of all housing, but it must ground its determination upon a common sense approach, and its survey must demonstrate "a good faith study" derived from "precise data" (*see Spring Val. Gardens Assoc. v Marrero*, 100 AD2d 93, 101, 104 [1984], *affd* 68 NY2d 627 [1986]; *see also Colonial Arms Apts. v Village of Mount Kisco*, 104 AD2d 964, 965 [1984]). The City's August 2003 report, which concluded that the vacancy rate never exceeded 5%, failed to meet that standard. The City thus failed to raise a triable issue of fact in opposition to the plaintiffs' showing because, among other things, it did not set forth collected data in an organized and coherent format and made no attempt to correlate the data in response to the plaintiffs' specific claims. Accordingly, the Supreme Court properly granted the plaintiffs' motion for partial summary judgment declaring that, from January 2003 through May 2003, the vacancy rate for the class of residential buildings with 100 or more units exceeded 5%, and

that the housing emergency with respect to that class of residential buildings is at an end (*see Executive Towers at Lido, LLC v City of Long Beach*, 11 AD3d 651, 652-653 [2004]).

The plaintiffs' challenge to the validity and enforceability of section 13-7.4 of the Ordinances of the City of Long Beach is without merit (*see* Unconsolidated Laws § 8623 [a]; *Kaplen v Town of Haverstraw*, 126 AD2d 606, 607-608 [1987]). [*3]

The City established its entitlement to summary judgment dismissing the plaintiffs' cause of action alleging civil rights violations pursuant to 42 USC § 1983 (*see Cuyahoga Falls v Buckeye Community Hope Foundation*, 538 US 188, 198 [2003]; *Bower Assoc. v Town of Pleasant Val.*, 2 NY3d 617, 628 [2004]; *cf. Town of Orangetown v Magee*, 88 NY2d 41, 53 [1996]). In opposition, the plaintiffs failed to raise a triable issue of fact (*cf. Del Monte Dunes at Monterey, Ltd. v City of Monterey*, 920 F2d 1496, 1508 [1990], *affd* 526 US 687 [1999]; *Brady v Town of Colchester*, 863 F2d 205, 215-216 [1988]; *Town of Orangetown v Magee, supra*).

Since this is, in part, a declaratory judgment action, the matter must be remitted to the Supreme Court, Nassau County, for the entry of a judgment declaring that section 13-7.4 of the Ordinances of the City of Long Beach is valid and enforceable, that the vacancy rate for that class of residential buildings with 100 or more units exceeded 5% for a period of time in excess of three months from January 2003 through May 2003, and that the housing emergency is at an end with respect to that class of residential

buildings. Schmidt, J.P., Rivera, Covello and Balkin, JJ., concur.

At and IAS Part 6 of the Supreme Court of the State of New York held in And for the County of Nassau at the Courthouse located at 100 Supreme Court Drive, Mineola, NY 11501 This 30 day of March, 2007

PRESENT:_____
Hon. Geoffrey J. O'Connell, J.S.C.

EXECUTIVE TOWERS AT LIDO, LLC, PAULSEN REAL ESTATE CORP., 465 SHORE ROAD, LLC, 10 MONROE BOULEVARD, LLC, and 25 FRANKLIN BOULEVARD, LLC,
Plaintiffs,

-against-

THE CITY OF LONG BEACH and THE CITY COUNCIL OF THE CITY OF LONG BEACH,
Defendants.

Index No. 007977-03

COUNTER JUDGMENT

Plaintiff, Executive Towers at Lido, LLC, Paulsen Executive Towers at Lido, LLC, Paulsen Real Estate Corp., 465 Shore Road, LLC, 10 Monroe Boulevard, LLC, and 25 Franklin Boulevard, LLC, having moved for partial summary judgment

requiring of defendant City of Long Beach (the City): (1) a declaration that the vacancy rate in the building owned by the plaintiffs located in the City of Long Beach containing 100 or more dwelling units exceed 5% for the months of January, 2003, through May, 2003, and in September 2003 and forward from that date to September 2004, and (2) of an end to the emergency under ETPA declared by the City with respect to regulated units in such buildings and (3) declaring illegal the City of Long Beach Local Law effective September 1, 2003 combining buildings with 60-99 units with units of 100 or more units as a single classification under ETPA; and the defendants having moved by way of cross-motion for a summary judgment seeking in order: (1) dismissing the fourth though thirteenth causes of action in the amended complaint on the grounds of *inter alia, res judicata,* collateral estoppel and failure to state a cause of action; (2) dismissing the fourteenth cause of action; and (3) dismissing the third and fifteenth causes of action for failure to state a cause of action; and the said motion papers in support and in opposition thereto having been submitted to the Court and the Court having rendered its decision and order dated September 30, 2005 and entered in the Office of the Clerk of the County of Nassau on October 5, 2005 and the plaintiff having appealed from so much of said order as dismissed the fourteenth cause of action contained in the plaintiffs' amended complaint and the defendant having cross-appealed from so much of said order as granted the plaintiffs' motion declaring that the 5% vacancy rate threshold was crossed during a period in excess of three months during the

months of January, 2003 though May, 2003 and that therefore the housing emergency should have been declared at an end, and the Appellate Division, Second Department having rendered its decision dated February 20, 2007 and remitting the matter to the Supreme Court, Nassau County for the entry of judgment in accordance with the Order, it is

ADJUDGED AND DECLARED that Section 13-7.4 of the Ordinance of the City of Long Beach is valid and enforceable, and

ADJUDGED AND DECLARED that the fourth through the thirteenth causes of action contained in the amended complaint of the plaintiff dated October 7, 2003 be and the same are hereby dismissed; and it is further

ADJUDGED AND DECLARED that the vacancy rate of the class of residential buildings with 100 or more units exceeded 5% for a period of time in excess of three months from January, 2003 through May 2003 and it is further

ADJUDGED AND DECLARED the housing emergency since January, 2003 is at an end with respect to that class of residential buildings; and its is further

ADJUDGED AND DECLARED that the City of Long Beach have judgment dismissing the fourth through thirteenth causes of action for monetary damages and

ADJUDGED AND DECLARED that the City of Long Beach have judgment dismissing the fourteenth cause of action for relief under 42 code §1983.

Enter

Hon. Geoffrey J. O'Connell

(LT)

ENTERED

APR 10 2007

NASSAU COUNTY
CLERK'S OFFICE

SHORT FORM ORDER

SUPREME COURT STATE OF NEW YORK

Present:
HON. GEOFFREY J. O'CONNELL, Justice
TRIAL/IAS, PART 6
NASSAU COUNTY

EXECUTIVE TOWERS AT LIDO, LLC, PAULSEN REAL ESTATE CORP., 465 SHORE ROAD, LLC, 10 MONROE BOULEVARD, LLC AND 25 FRANKLIN BOULEVARD, LLC,
Plaintiff(s),

-against-

THE CITY OF LONG BEACH and THE CITY COUNCIL OF THE CITY OF LONG BEACH,
Defendant(s).

INDEX No. 7977/03
MOTION DATE: 7/14/05
MOTION SEQ. No. 2 3

The following papers read on this motion:

Plaintiffs' Notice of Motion/Affirmations/ Memorandum of Law/Exhibits
Defendants' Affirmation in Opposition/Exhibits
Reply Affirmation
Defendants' Notice of Motion/Affidavit/Memorandum of Law/Exhibits
Plaintiffs' Memorandum of Law in Opposition

Plaintiffs Executive Towers at Lido, Paulsen Real Estate Corp., 465 Shore Road, 10 Monroe Boulevard

and 25 Franklin Boulevard apply to the Court for partial summary judgment granting Plaintiffs an order directing that Defendant City of Long Beach to declare: (1) that vacancies in buildings subject to The Emergency Tenant Protection Act (Unconsolidated laws § 8621 et seq.) exceed 5%; (2) that the "housing emergency" is at an end; and (3) that the local law combining buildings with 60 to 99 units and buildings with 100 or more units "illegal."

Defendant City of Long Beach applies to the Court for summary judgment: (1) dismissing the Fourth through the Thirteenth Causes of action on the grounds of *res judicata,* collateral estoppel and failure to sate a cause of action; (2) dismissing the Fourteenth Cause of Action based upon documentary evidence; and (3) dismissing the Third and Fifteenth Causes of Action for failure to state a cause of action.

According to the Amended Verified Complaint dated October 7, 2003, each of the Plaintiffs owns an apartment building located in Defendant City of Long Beach that has more than one hundred dwelling units. By Resolutions 183/00 dated August 15, 2000 and 53/01 dated March 20, 2001, the City Council of the City of Long Beach declared an "emergency" pursuant to the Emergency Tenant Protection Act, Uncons. Law § 8623(a) with respect to apartment buildings having one hundred or more units. That statute provides in part: "A declaration of emergency may be made as to any class of housing accommodation if the vacancy rate for the housing accommodation in such class within such municipality is not in excess of five percent...."Subsection (b) of the same, statute provides in part: "The emergency must be declared

at an end once the vacancy rate described in subdivision a of this section exceeds five percent" The Amended Verified Complaint alleges that each month commencing with January of 2003 and continuing through May of the same year Plaintiffs supplied data to the Defendant City demonstrating that the vacancy rate exceeded five percent, but that Defendants failed to act promptly upon that data which Plaintiffs contend was a repetition of the Defendants established dilatory practice. The Defendant City did issue "Findings and Conclusions Regarding Vancancy Rates in the City of Long Beach for Buildings with 100 or More Units" dated August 15, 2003 in which it found that a vacancy rate of five percent had not been exceeded.

There are fifteen causes of action enumerated in the Amended Verified Complaint. The First Cause of Actions seeks a declaration that the vacancy rate exceeded five percent during the period from January through May of 2003. The Second seeks a judgment declaring the "emergency" at an end. The Third asks for a declaration that Defendants acted beyond their powers in issuing the August 15, 2003, "Findings". The Fourth seems to seek damages of $1,500,000.00 on behalf of Plaintiffs Executive Towers; the Fifth damages of $10,000,000.00 for the same Plaintiff; the Sixth damages of $750,000.00 for Plaintiff Paulsen; the Seventh damages of $8,000,000.00 also for Plaintiff Paulsen the Eighth damages of $500,000.00 for Plaintiff 465 Shore Road, the Ninth damages of $5,000,000.00 for the same Plaintiff; the Tenth damages of $500,000.00 for Plaintiff 10 Monroe Boulevard; the Eleventh damages of $5,000,000.00 for the same Plaintiff; the

Twelfth damages of $500,000.00 for Plaintiff 25 Franklin Boulevard; the Thirteenth damages of $5,000,000.00 for the same Plaintiff; the Fourteenth asserts a claim for damages for a civil rights violation under section 1983 of the United States Code; and the Fifteenth Cause of Action seeks a judgment declaring that the resolution of Defendant Long Beach City Council combining buildings containing 60 to 99 dwelling units with those containing 1000 and more dwelling units to create a new class of accommodation null and void.

Background:
The Emergency Tenant Protection Act

The Emergency Tenant Protection Act was first enacted in 1974. The legislative findings upon which it is based are set forth in Uncons. L. § 8622 which states in part:

> "The legislature hereby finds and declares that a serious public emergency continues to exist in housing of a considerable number of persons in the state of New York which emergency was at its inception created by war, the effects of war and the aftermath of hostilities, that such emergency necessitated the intervention of federal, state and local government(s) in order to prevent speculative, unwarranted and abnormal increases in rents; ...."

A local legislative *may* declare an emergency as to any class or as to all housing accommodations

when the vacancy rate within the municipality does not exceed five percent, but it *must* declare the emergency at an end once the vacancy rate exceeds five percent. (Uncons. L. § 8623(a) and (b) (emphasis supplied); *Roslyn Garden Associates v Board of Trustees* , 190 AD2d 722,723 [2d Dept., 1993]). "No resolution declaring the existence or end of an emergency . . . may be adopted except after public hearing on not less than ten days notice . . . ." (Uncons. L. § 8623c) Once an emergency has been declared, a rent guidelines board must be created which thereafter regulates rent increases in accordance with guidelines set by the county rent guidelines board. (Uncons. L. § 8624).

The Emergency Tenant Protection Act specifies no method as to how the local legisiative body is to ascertain the vacancy rate. *(Spring Valley Garden Associates v Marreo,* 100 AD2d 93, 98 [2d Dept, 1984]).

However, any determination with respect to the existence of an emergency must be based upon "reasonable grounds." *(Id. at* page 98). The failure of the legislative body to make the specific findings called for in the statute or reliance upon materials of questionable validity will result in a voiding of the declaration. *(Colonial Arm Apmts. v ViIlage of Mt. Kisco,* 104 AD2d 964 [2d Dept, 1984]). Also fatal is a failure to give the notice of hearing required by the statute. *(Ibid).* Nevertheless, a declaration with respect to the existence of an emergency is a legislative act that is presumed valid. *(Spring Valley Garden* Associates *v Marreo,* 100 AD2d 93, 99 [2d Dept, 1984]). The burden of proof on the party challenging it, is a heavy one, but not,

insurmountable. *(See Colonial Arms Apartments v Village of Mt. Kisco,* 104 AD2d 964 [2d Dept, 1984]; *Roslyn Garden Associates v Board of Trustees,* 190 Ad2d 722,723 [2d Dept.1993]).

Prior Litigation

At least some of these plaintiffs previously litigated with these defendants the question whether the vacancy rate for buildings with 100 or more dwelling units exceeded five percent in March, April, May and June of 1996. Upon the stipulation of the parties, former Justice Eli Wager was appointed Special Referee to try the issues presented and he presided at a 15 day trial after which he issued a 22 page "determination." Referee Wager made the following "Findings of Fact and Conclusions of Law":

"1.. I find as to the ETPA control units in apartment buildings have (sic) 100 units or more, that for the four month period from March, April, May and June of 1996. the vacancy rate exceeded 5%.

2. I find that as respects the ETPA controlled apartment buildings in the City of Long Beach having 60-99 units per Building, that the vacancy rate did not exceed 5% during the years 1996 and 1997, and accordingly, ETPA controls were properly in full force and effect and should be continued beyond that date.

3. I find that the plaintiff landlords of that category of building containing 100 units or more, during the period of March, April, May and June of 1996 are entitled to a trial on the issue of damages, if any, for the failure of the City of Long Beach to hold a public hearing and to terminate EPTA

rent regulations on such buildings. *See*, § 8623(c)."

Referee Wager then went on to consider damages and made a monetary award in a further decision dated July 1, 2002.

OTHER RELATED PROCEEDINGS

On Jan. 24, 2003 Plaintiffs commenced a lawsuit in which they sought a judgment declaring Resolution No. 183/00 by Defendant City Council determining that there was an housing emergency with respect to buildings having one hundred or more dwelling units "invalid and unenforceable" and awarding monetary damages.

> ". . .[B]efore the Special Referee rendered his Final Determination, the City of Long Beach, in a resolution dated August 15, 2000, readopted the ETPA as of September 1, 2000, as to units in large and medium buildings on the grounds that the vacancy rate was below 5%. After the Special Referee's Final Determination, the City adopted an additional resolution in March, 2001 making the ETPA applicable to buildings of 100 units or more retroactive to July 1, 1996." (In *the Mutter of Executive Towers at Lido v New York State Division of Housing & Community Renewal.* (Supreme Court, Nassau County, Index No. 8448 of 2003, dec. June 29, 2004, at page 3).

Defendants made a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211(a)(7)) which this court granted finding that, inasmuch as the Defendant City of Long Beach had undertaken an investigation and scheduled a hearing with respect to the existence of a continuing emergency as mandated by Uncons. L. § 8623(c) which hearing had been adjourned for a reasonable period of time, the lawsuit was premature. The claims for monetary damages were also dismissed upon the grounds that the statute did not provide for such private causes of action. *(Executive Towers At Lido et al. v The City of Long Beach et al.,* Supreme Court, Nassau County, Index No. 1284/2003, Apr. 16, 2003).

At about the time that Plaintiffs commenced the present action they also brought an Article 78 proceeding in which they challenged a determination by the New York Sate Division of Housing and Community Renewal made after the City of Long Beach adoption Resolution No. 183/00 finding that a housing emergency existed with respect to buildings having one hundred or more dwelling units. That action was assigned to Justice Lally of this court and the facts are set forth in her decision entitled *In the Matter of Executive Towers at Lido v New York State Division of Housing & Community Renewal.* (Supreme Court, Nassau County, Index No. 8448 of 2003, dec. June 29, 2004).

The adoption by the City of Long Beach of Resolution 183/00 triggered the application by the Division of Housing and Community Development of its regulations to determine the "initial regulated rent" for apartments located within buildings having

one hundred or more dwelling units. Section 2501.1 of those regulations provides in pertinent part: "(b) For all other housing accommodations subject to the act, the initial legal regulated rent shall be the rent reserved in the last effective lease or other rental agreement prior to the local effective date of the act." (22 NYCRR § 2501.1(b)). Pursuant to Uncons. L. § 8626 (a) the "local effective date" means the first day of the first month following the declaration of the emergency. Because the City of Long Beach had never declared the "emergency" at an end prior to its declaration of an "emergency" in Resolution 183/00, the "initial regulated rent" was the "regulated rent" in effective Sept. 1, 2000 and that rent had never been deregulated.

After the Division of Housing and Community Development adopted as the "initial regulated rent" what had been a "regulated rent," at least some of the Plaintiffs made application pursuant to Uncons. L. § 8629(a) and 9 NYCRR § 2502.3(b)(1) for an adjustment of the "initial regulated rent" based upon "unique or peculiar circumstances," The "unique or peculiar circumstances' offered was that because the City of Long Beach had failed to take appropriate actions to declare the "emergency" at an end in the Spring of 1996, the subject apartments continued to be regulated when they should have been at market rentals. The landlords contended that as a result the basis used to determine the "initial regulated rent' was inappropriate. According to Justice Lally's decision;

> "...the District Rent Administrator denied petitioners' [the landlords'] applications on the grounds that 1) the inability of the

> owners to obtain even regular ETPA rents, which resulted in the more than 5% vacancy rate for a 'brief time period,' does not create a credible basis for even higher increases; 2) the ETPA precludes consideration of rental history which predates an application by more than four years; 3) petitioners failed to advise tenants of their right to request a fair market rent appeal; and 4) it would be 'inappropriate' to provide for increases in rent when two of the owner petitioners have been awarded $6 million in damages by the Special Referee," *(In the Matter of Executive Towers at Lido v New York State Division of Housing & Community Renewal.* (Supreme Court, Nassau County, Index No. 8448 of 2003, dec. June 29,2004; pages 3-4).

Justice Lally vacated the determination of the Division of Housing and Community renewal and remanded the matter for reconsideration. An appeal of Justice Lally's decision is currently before the Appellate Division.

The Present Action

By separate letters dated respectively Jan. 2, 2003 and Jan. 9, 2003, Martin Shlufman and Herbert Rubin, both attorneys for Plaintiffs, informed Defendants that the vacancy rate for buildings have 100 or more dwelling units exceeded 5% and demanded that the procedures for declaring the "emergency" at an end be undertaken. In a response dated Jan. 17, 2003, the City of Long Beach

requested certain additional information from Plaintiffs and said that it was commencing its own investigation with respect to the claimed vacancies. There followed a flurry of communications back and forth with Plaintiffs demanding action and the City asserting that it was diligently pursuing its investigation.

Plaintiffs had delivered to Defendants some of the records that had been requested during the January 2004 flurry of correspondence. Delivery was by Federal Express with a cover letter dated Mar. 26, 2003. Affidavits were obtained from City employees Joseph Brand and Clifford Lay, the latter a summer intern, attesting that .they had investigated vacancies in buildings with sixty of more units beginning in April and continuing through July 2003 and stating their findings. By Resolution No. 173/03 approved by Defendant City Council on Aug. 19, ,2003, it adopted; "Findings and Conclusions dated August 15, 2003 Regarding Among Other Things, Vacancy Rates in the City of Long Beach for Buildings with 100 or More Units and Determining That There is a Need for Continued Regulation and Control of Such Residential Rents within the City of Long Beach," These "Findings," 'which more nearly resemble a legal argument or brief than findings of fact, recite that declaration of a housing emergency in the City of Long Beach pursuant to the Emergency Tenant Protection Act had been continuous since 1979. It asserts that the separate classification of buildings with 60 to 99 housing units and buildings with 100 or more housing units was an accident of history

which "only arose because the resolutions were adopted at different times." ("Findings" at page 2).

There is no reference to the decision by Referee Wager or the resulting judgment apparently entered on Aug. 2, 2002. The January 2003 correspondence with Plaintiffs' attorneys is mentioned and the "Findings" recite that "appropriate notices" of the Mar. 4, 2003 and July 1, 2003 hearings were given. The same Resolution declared an emergency with respect to "all multiple dwellings located within the City of Long Beach that contain housing accommodations of sixty or more dwelling units ..."

A separate Resolution, identified as "Item No. 4" the agenda for Aug. 19, 2003, amended the ordinances of the City of Long Beach to replace Sections 13-7.2 and 13-7.3 with a new Section 13-7.4 "Rent Stabilization for Multiple Dwellings of More Than Sixty (60) Units." Subsection (a) of the new section declared the existence of a emergency as to all multiple dwellings that contain housing accommodations for sixty or more dwelling units.

On or about May 20, 2003 Plaintiffs commenced the present action and at the time of the adoption of the two resolutions on Aug. 19, 2003, a motion to dismiss had already been made. The parties entered a stipulation on Nov. 5, 2003 which permitted service of the Amended Verified Complaint as well as responsive pleadings.

Meanwhile, the entire judgment based on Referee Wager's determination was the subject of an appeal and cross appeal. In anticipation of a decision from the Appellate Division, proceedings on this complaint were held in abeyance. A memorandum

decision by the Appellate Division was issued on October 25, 2004.
(Executive Towers at Lido v City of *Long Beach,* 11 AD3d 651 [2d Dept, 2004]). The judgment based upon Referee Wager's determinations had included the following as a second decretal paragraph:

> " ORDERED, ADJUDGED, AND DECREED that the vacancy rate as referred to in Sections 3 (a) and (b) of the ETPA with respect to the classification of residential buildings in the City of Long Beach consisting of 100 or more housing units was in excess of five percent during March, April, May and June 1996, and that in consequence, defendants, the City of Long Beach and the City Council of the City of Long Beach were obliged to declare the emergency at an end as to said classification of buildings ....,"

The Appellate Division modified this paragraph only to the extent of deleting the words "and June." Those - decretal paragraphs which had awarded the plaintiffs monetary damages were deleted and replaced by a declaration that defendants were not liable for any damages. The Appellate Division found that landlords had no private right of action under the Emergency Tenant Protection Act since they were not members of the protected class and; "A private right of action under the Act in favor of landlords would serve to undermine, not promote the, objective of the Legislature." (*Id.* at 653). Leave to appeal to the Court of Appeals was denied. *(Executive Towers at*

Lido, LLC v. City of Long Beach, 4 N.Y.3d 707 (Mar. 29, 2005)).

The Claims for Monetary Damages

The Appellate Division held in the appeal of referee Wager's determination, as did this court in its decision of April 10, 2003 under index no. 1284 of 2003, that the Emergency Tenant Protection Act confers no private right of action upon landlords. *(Executive Towers at Lido v City of Long Beach,* 11 AD3d 651, 653-654 [2004]). Accordingly those causes of action seeking monetary damages based on the City of Long Beach's alleged failure to comply with the mandates of the Emergency Tenant Protection Act must be dismissed.

The Fourteenth Cause of Action asserts a denial of civil rights in violation of section 1983 of title 42 of the United States Code. There is a two part test for a substantive denial of due process in violation of that statute: "First, claimants must establish a cognizable property interest, meaning a vested property interest. ... Second, claimants must show that the governmental action was wholly without legal justification . . . ." *(Bower Associates v Town of Pleasant Valley*, 2 NY3d 617, 627 (2004) (citations omitted)). "As for the second element of the test, 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense' *(City of Cuyahoga Falls, Ohio v Buckeye Community Hope Found.,* 538 US 188,198 [2003][internal quotation marks omitted;...)." (*Id.* at 629). Thus, an evaluation of the merits of the alleged denial of due process requires a consideration of Plaintiffs claims that the

actions taken by the Defendant's with respect to the existence of a housing emergency in 2003 were improper and unjustified.

Criteria for Determining Whether a Housing Emergency Has Ended

While the Emergency Tenant Protection Act in Uncons. L. § 8623 makes a vacancy rate of five percent or less the trigger for a declaration of a housing emergency and a vacancy rate in excess of five percent the trigger for declaring the emergency at an end, it provides neither a definition of the term "vacancy" nor a method for ascertaining the "vacancy rate," *(Spring Valley Gardens Associates v Marrero,* 100 AD2d 93, 98 [2d Dept, 1984]. As noted, the declaration of a housing emergency is a legislative act entitled to a strong presumption of validity, but it must be based upon a good-faith study, a common sense approach and precise data. *(Id. at 101, 104; Colonial Arms v Village of Mt. Kisco,* 104 AD2d 964, 965 [2dDept, 1984]). The municipality is not free to simply declare an emergency without undertaking some effort to determine the vacancy rate *(Roslyn Gardens Assocs. v Board of Trustees,* 190 AD2d 722 [2d Dept, 1993]) nor may it rely upon "nonspecific and conclusory papers" generated for another purpose (*Colonial Arms v Village of Mt. Kisco, supra).*

Referee and Retired Justice Wager wrestled with the problem of applying this statute despite the lack of precise criteria in rendering his determination. Drawing upon an earlier decision by Justice James F. Niehoff *(Walton v City of Long*

Beach, Index No. 18994/74), he defined "vacant apartment" to mean; "one in the absolute control of the landlord, unoccupied, unencumbered by leases or other agreements, to which the landlord may give immediate legal occupancy." ("Determination of Special Referee Hon. Eli Wager After Trial" at page 9). Upon determining which apartments were "vacant" the "vacancy rate" could; "be computed as a mathematical fraction with the number of vacancies in a specific building as numerator over the total number of all apartment units in the building." *(Ibid.)*.

Referee Wager also had to construe that portion of Uncons. L. § 8623(b) which states; "The emergency must be declared at an end once the vacancy rate. . . exceeds five percent." The landlords argued that "once" the 5% threshold was crossed a hearing and the termination of "emergency" was mandatory. The City argued that the crossing of the 5% threshold must continue for some period because to hold otherwise would impose an undue hardship. Saying that the word "once" should be literally construed, Referee Wager held; "the 5% vacancy rate threshold was exceeded for apartment buildings having 100 or more units, more than "once" during the months of March, April, May and June of 1996." The Appellate Division did not comment upon Referee Wager's methodology and modified his result only to the extent of deleting June of 1996 because it found that the vacancy rate for that month was 4.95%.

Since Referee Wager found that the 5% threshold was crossed during a four month period commencing in March of 1996, his construction of

the word "once" was not essential to his determination. The Appellate Division left undisturbed his determination as to a continuous three month period. The reversal by the Appellate Division of the award damages as well as the actions of the Division of Housing and Community Renewal provide cause for a reconsideration of this issue.

Among the stated purposes of the Emergency Tenant Protection act is the prevention of "uncertainty, hardships and dislocation." (Uncons. L. § 8622). In construing a statute; "Literal meanings of words are not to be adhered to or suffered to 'defeat the general purpose and manifest policy intended to be promoted." (*People v Ryan,* N.Y. 149,152 (1937); *Council of the City of New York v Giuliani,* 93 NY2d 60, 69 (1999)). The words of a statute will not be blindly applied; "to arrive at an unreasonable or absurd result" *(Williams v Williams,* 23 NY2d 592, 599 (1969)). Referee Wager's hearing focused on a two year period. He found that there were 808 apartments in the six buildings that comprised the class of buildings having 100 or more dwelling units. It was only during one four month period that the 5% threshold was found to be exceeded based on evidence of vacancies of 40, 41, 54 and 54. The Appellate Division reversed the finding based on 40 vacancies because that converts to only 4.95% while the 41 vacancies would produce a rate of 5.07%. A construction of the Emergency Tenant Protection Act that would permit the declaration of a housing emergency, or mandate the declaration of its end, based upon minor fluctuations in the vacancy rate at monthly or even shorter intervals would hardly achieve the legislature's goal of preventing

"uncertainty, hardship and dislocation." The disruption would be particularly accute if, as the landlords contend in their related proceeding, the Division of Housing and Community Development were repeatedly required to adjust the "initial regulated rent" based upon "unique or peculiar circumstance" of a fluctuating housing emergency. (Uncons. L. §8629(a); 9 NYCRR § 2502.3(b)(l)). A reasonable construction of the governing statute which avoids unnecessary "uncertainty, hardship and dislocation" is one which requires that the crossing of the 5% threshold continue for a sufficient period of time to assure that the particular vacancy rate is more than a transitory aberration. Accordingly, with due respect for a former colleague, this court does not construe the word "once" to mean that any crossing of the threshold, no matter how fleeting, triggers the statutory consequences, but rather, adopting an alternative dictionary meaning, construes "once" to mean that *if ever* or *whenever* the 5% threshold is crossed for a sufficient period of time to demonstrate that it is more than a relatively temporary aberration, then the statutory consequences are triggered.

The Plaintiffs seek a declaration that the vacancy rate exceeded five percent during the period from January through May of 2003. Applying the criteria used by Justice Wager has been complicated, however, by growing effect of vacancy and luxury decontrol. In 1993 the Legislature passed and the Governor signed an amendment to the Emergency Tenant Protection Act (Uncons. L. §8625(a)(13)) that "decontrolled" "luxury" apartments upon a finding that an inordinate amount of public resources were

being expended on rent regulations which benefitted high income tenants. (Introducer's Memorandum in Support, Governor's Bill Jacket, L 1993, chap 253)). According to figures supplied by the Plaintiffs, by September of 2003 the number of apartments subject to the Emergency Tenant Protection Act in buildings having one hundred or more dwelling units had fallen from 810 to 690. By January of 2004 it was 674. The impact in buildings with sixty to ninety-nine dwelling units was less marked. Of the 260 apartments, 259 were still subject to the Act in September of 2003 and 257 in January of 2004.

The Determination of a Continuing Emergency

As noted, the Defendants adopted a "finding" that; "the vacancy rate in the rental accommodations in the City containing 100 or more dwelling units has not exceeded 5% during the relevant periods." However, it is not all that clear precisely what was meant by "relevant periods." The first page of the "Findings and Conclusions" recites the Plaintiffs assertion that, in January of 2003, 50 out of 810 apartments in buildings with more than 100 dwelling units were vacant for a vacancy rate of 6.2%. The letter of Herbert Rubin to Corporation Counsel for the Defendant City dated Jan. 17, 2003, made clear Plaintiffs position that they need only to demonstrate that the vacancy rate exceeded 5% in January of 2003. Nevertheless, in response to the Defendant's request Mr. Rubin supplied information that the Defendants had requested reflecting vacancies during January, February and March of 2003. In the "Findings" dated August 15, 2003, there

is recited vacancy information furnished by Plaintiffs for each month commencing December of 2002 through May of 2003. For the reasons already discussed the Court agrees with the Defendants that the vacancy rate must continue for a sufficient period to eliminate the possibility that it is an aberration. However in determining the length of that period the Court cannot ignore the fact that the Appellate Division sustained Referee Wager's determination that the emergency had ended based on a vacancy rate that lasted for three months.

Plaintiffs have the burden of proving that the Defendants' determination that the emergency had not ended was the not the product of a common sense good faith analysis of precise data derived from a survey. (*See, Spring Valley Associates v Marrero,* 100 AD2d 93,101 [2d Dept, 1984] *aff'd* 68 NY2d 627; *Colonial Arms Apartment v. Village of Mt. Kisco* 104 AD2d 964,965 [2d Dept, 1984). Defendant's 'Findings" use as their starting point the data supplied by Plaintiffs for the period from December 2002 through May of 2003.Working back from the percentages in the "Findings" the Court calculates that the Plaintiffs' claimed the following number of vacancies and vacancy rate based on 810 dwelling units in the class: December 2002: 41 or 5.06%; January 2003: 50 or 6.17%; February: 5.1 or 6.3%; March: 52 or 6.42%; April: 49 or 6.05% and May: 48 or 5.93%. Defendants sought to discount certain vacancies because they lasted only a month or two. Any survey to determine a vacancy rate is necessarily a snap shot taken at a particular time. While an apartment vacant this month may be

rented during the next, the converse is also true. To avoid an aberration this Court agrees that the "vacancy rate" should continue for some period of time, but that does not mean than any particular vacancy must last for any particular period to be a vacancy. Moreover, the definition of "vacancy" adopted by Referee Wager in the prior proceeding between these same parties provides additional protection. Defendants do not contend that any of the vacancies counted by Plaintiffs failed to satisfy that definition.

Defendants' "Findings" argue that certain vacancies should not be counted because the next rent for these apartments would exceed $2,000 a month and result in their being decontrolled. A municipality may permissibly survey only dwellings within the particular class *(Kaplan v Town of Haverstraw,* 126 AD2d 606 [2d Dept. 1987) or it may survey all accommodations including exempt units *(Central Plains Co. v City of White Plains,* 48 AD2d 326 [2d Dept, 1975]). What it cannot do, however, is cherry pick only certain units which suit its purposes. Here, while arguing that vacant units which are about to become exempt should not be counted, Defendants would count, for vacancy rate purposes, 110 units located in a building known as "the Avalon" that has never been subject to the Emergency Tenant Protection Act and the rents in which range from $3,000 to $4,000 a month. Defendants' "Findings" fail to demonstrate that how eliminating dwelling units that are or are about to become exempt would affect the vacancy rate for the months in question. On the other hand, Plaintiffs

have provided a schedule which purports to demonstrate that during the period September 2003 through January 2004 the vacancy rate exceeded 5% whether or not exempt apartments were counted.

The "Findings" cite the historical vacancy rates, statistics from the Division of Housing and Community Renewal for 2001 and 2002 and census figures from 2002. While such circumstantial evidence might lend credibility to specific allegations of distortion or manipulation of data by the Plaintiffs, no such specific allegations are made despite the fact that Defendants sought and apparently obtained documents related to vacant apartments, exempt apartments, rent rolls, lease documentation, new leases, rental activities, applications for leases and rejected applications. Defendants do not claim that any specific necessary data was withheld. While Defendants suggest that the increased vacancies during the months in question might be seasonal, the leases under the Emergency Tenant Protection Act are for terms of one or two years.

The survey undertaken by Defendants was not commenced until May and surveyed vacancies existing in only May and July of 2003. The data, such as it was, was obtained by personal visits to the buildings and also by telephone calls. In some instances the person contacted was a building superintendent or an employee of the management office, but in others its was a real estate office. The information derived from these surveys was never organized and presented in a coherent format. While

the vacancy information was permissibly gathered for both classes of buildings, it was never correlated to the Plaintiff's specific claims or reduced to even an approximate vacancy rate. Thus, it cannot be said that these surveys constituted; "a good-faith study . . . based on precise data obtained from a substantial majority of the buildings in the two classes. (*Spring Valley Gardens Associates v Marrero*, 100 ADd2d 93,101 [2d Dept, 19841 *aff'd* 68 NY2d 627). Nor do these surveys provide any basis for discounting the vacancy figures supplied by the Plaintiffs for the months from December 2002 through April of 2003.

The Defendants' "Findings" reject Plaintiffs claims with respect to the vacancy rate from January through May of 2003 because Plaintiffs failed; "to indicate any market factors or other rational acceptable conditions which would explain this alleged severe spike in the vacancy rates..." The statute, however, only requires that the vacancy rate cross the 5% threshold. There is no requirement that the vacancy rate fluctuation have an explanation.

Reference is made in the "Findings" to a certain lease rider attached to lease renewals by Plaintiff Paulsen Real Estate Corporation. However, the suggestion that this lease rider caused tenants to vacate their apartments and not renew their leases is unsupported by any facts.

Based on this record the Court is constrained to hold that the 5% threshold was in fact crossed during a period in excess of three months during the

period of January through May of 2003 and the "emergency" should have been declared at an end.

The Civil Rights Claim

Only the most egregious official conduct can be said to be arbitrary in the constitutional sense. (*City of Cuyuhoga Falls, Ohio v Buckeye Community Hope Found.*, 538 US 188, 198 [2003]; *Bower Associates v Town of Pleasant Valley*, 2 NY3d 617,629 (2004). Given the lack of statutory criteria and relative lack of appellate guidance for application of the Emergency Tenant Protection Act, this Court cannot find that anything that Defendants did in the case would entitle Plaintiffs to damages for having been denied due process. Their claim for such damages is dismissed.

Reclassification of Buildings Subject to the ETPA

Plaintiffs seeks a declaration that the reclassification of buildings with 60 to 99 dwelling units and 100 or more dwelling units should be declared null and void. It is a source of some bemusement that the Defendant City which now argues that the separate classifications were an historical accident thirty years ago argued before Justice Niehoff that there was a sound and rational basis for separate classification. At that time the landlords, of course, opposed the separate classes. Nevertheless, the decision to separate or join the two categories of property is the very essence of a legislative act with this Court will presume valid.

Such presumption is particularly appropriate here because the Defendant City would be free to consider all properties with 60 or more dwelling units in determining the vacancy rate without regard to whether there are one or two classifications (*Central Plains Co. v. City of White Plains,* 48 AD2d 326 [2d Dept, 1975]) so long as it undertook a common sense analysis of precise data derived from a good faith survey.

Conclusion

Since damages are not available the ultimate practical effect of this decision will depend largely on the outcome of the pending appeal of Justice Lally's decision and the actions which the Division of Housing and Community Renewal may ultimately take.

It is, SO ORDERED.

Dated: Sept 30, 2005

HON. GEOFFREY J. O'CONNELL, J.S.C.

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